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No. 85-725

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WOODROW MAUGET,

Petitioner,

vs.

KAISER ENGINEERS, INC.,

and

PIPE FITTERS UNION LOCAL NO. 392,

Respondents.

On Petition for A Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT KAISER ENGINEERS, INC. IN OPPOSITION

Michael W. Hawkins
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel of Record for Respondent
Kaiser Engineers, Inc.

Of Counsel:

Robert E. Kaplan
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut, Street
Cincinnati, Ohio 45202
(513) 977-8200

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

Did the court below properly give retroactive effect to *DelCostello* v. *International Brotherhood of Teamsters*?

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BRIEF FOR RESPONDENT KAISER ENGINEERS, INC. IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) was not reported. Nor was the district court's opinion and order dismissing the claims against Respondent Pipe Fitters Union Local No. 392 (Pet. App. C1-C4) reported. The district court's opinion and order granting summary judgment in favor of Respondent Kaiser Engineers, Inc. (Pet. App. B1-B18) appears at 546 F. Supp. 486 (S.D. Ohio 1982), *appeal dismissed without opinion*, 708 F.2d 725 (6th Cir. 1983).

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* Pursuant to this Court's Rule 28.1, the subsidiaries (except wholly owned subsidiaries) and affiliates of Kaiser Engineers, Inc. are Raymond Engineers Australia Pty. Limited, Kaiser Engineers Power Corporation, and Phillips Barratt Kaiser Engineering Limited.

JURISDICTION

The court of appeals entered its judgment (Pet. App. A1-A3) on August 2, 1985. The petition for a writ of certiorari was filed October 29, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), set forth in Appendix A.

COUNTERSTATEMENT OF THE CASE

Petitioner Woodrow Mauget was employed pursuant to a collective bargaining agreement between Respondents Kaiser Engineers, Inc. ("Kaiser") and Pipe Fitters Union Local No. 392 ("the Union"). On December 7, 1976, Kaiser discharged Mauget for violating a work rule by being absent three consecutive days without notification. Mauget, claiming he had in fact notified Kaiser, contacted a Union steward and business agent about the discharge. An investigation by the Union revealed no information to suggest Mauget's termination was in error, and the Union therefore did not further process Mauget's grievance.

Mauget filed an unfair labor practice charge against the Union with the National Labor Relations Board in June 1977. During the Board's investigation, Mauget contended the Union had caused Kaiser to rescind his reinstatement, had unlawfully declined to pursue his grievance, and had refused to refer him to other employment subsequent to his termination. The Board, on October 26, 1977, affirmed that Mauget's charge was without merit.

Over thirteen months later — and exactly two years after his discharge — Mauget sued Kaiser under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for

breach of the collective bargaining agreement. He subsequently amended the complaint on March 8, 1979, by joining the Union as a defendant for an alleged breach of its duty to fairly represent him.

Relying on *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), which held that a state's statute of limitation for vacating arbitration awards controlled a § 301 action against an employer, the district court dismissed as untimely Mauget's claims against Kaiser and most of his claims against the Union. Those claims, the court reasoned, were not filed within the three-month limitations period for vacating arbitration awards specified in Ohio Rev. Code § 2711.13. Construing Mauget's amended complaint against the Union to include a claim for unlawful refusal to refer Mauget out of the hiring hall for work subsequent to his discharge, the district court refused to dismiss the latter claim. Instead, the court ruled timely that portion of the amended complaint, as required by Ohio's six-year limitations period for liabilities created by statute, Ohio Rev. Code § 2305.07.

This Court thereafter directed in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), that the six-month statute of limitations in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), governs employee actions against employers for breach of a collective bargaining agreement and against unions for breach of the duty of fair representation. The district court, according retrospective effect to *DelCostello*, ultimately dismissed as untimely Mauget's remaining claim against the Union.

On appeal, the Sixth Circuit affirmed both rulings of the district court. The appellate court, adhering to its decision in *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*), applied *DelCostello* retroactively to bar Mauget's suit.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY DETERMINED, IN ACCORDANCE WITH THIS COURT'S RETROACTIVE APPLICATION OF *DELCOSTELLO*, THAT *DELCOSTELLO* WAS NOT LIMITED TO PROSPECTIVE FORCE.

This Court, after concluding in *DelCostello* that hybrid § 301/duty of fair representation suits had to be brought within six months of their accrual, declined to give its ruling prospective only effect. The Court reversed and remanded *DelCostello* for consideration of whether certain events had tolled the running of the limitations period so as to save the otherwise time-barred claims. In *DelCostello's* companion case, *United Steelworkers* v. *Flowers*, 462 U.S. 151 (1983), the Court reversed and held the action untimely because it was filed more than ten months after accrual.

Concluding this Court's retroactive application of the six-month limitations period in *DelCostello* and *Flowers* was no idle exercise, the full Sixth Circuit, in *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (en banc), reasoned:

> [T]he Supreme Court implicitly held in *DelCostello* that the statute of limitations should be applied retroactively by barring the claim that was in front of the Court. . . . If the Supreme Court had not intended for *DelCostello* to apply retroactively, the Court easily could have reserved the issue or could have applied the statute of limitations prospectively, as it did in *Chevron* [*Oil Co.* v. *Huson*, 404 U.S. 97 (1971)]. By applying the statute of limitations to extinguish the claim in the case before the Court, we feel the Supreme Court demonstrated its intent to apply *DelCostello* retroactively. Accordingly, we hold that the sixth-month statute of limitations for hybrid, section 301/unfair representation claims is applicable to all cases pending at the time *DelCostello* was decided.

747 F.2d at 375. *Accord Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 512 (1984); *Zemonick* v. *Consolidated Coal Co.*, 762 F.2d 381 (4th Cir. 1985) (Ervin, C.J., dissenting). *See also Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 594 (1984) (citing *Welyczko* and applying *DelCostello* retroactively).

The present suit, consistent with the directive in *Smith* v. *General Motors*, was dismissed by the appeals court. In doing so, the Sixth Circuit correctly followed this Court's lead in *DelCostello* and also adhered to the well-settled principle that generally "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969) (footnote omitted). The writ accordingly shoud be denied.

II. ASSUMING, ARGUENDO, THAT *DELCOSTELLO*'S RETROACTIVITY IS TO BE ANALYZED ACCORDING TO THE *CHEVRON OIL* CRITERIA, THIS COURT'S REVIEW IS UNNECESSARY.

Petitioner urges that the court below erred in dismissing his lawsuit based on *Smith* v. *General Motors*. Instead, contends Petitioner, the Sixth Circuit was bound to decide this case in compliance with *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), despite this Court's having given retroactive effect to the six-month statute of limitations in *DelCostello* and *Flowers* without a *Chevron* analysis. Many appeals courts have examined the three *Chevron* criteria and concluded they favor retroactive force for *DelCostello*. *Local Union 1397* v. *United Steelworkers*, 748 F.2d 180 (3d Cir. 1984); *Landahl* v. *PPG Industries, Inc.*, 746 F.2d 1312 (7th Cir. 1984); *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); *Lincoln* v. *District 9, International Association of Machinists*, 723

F.2d 627 (8th Cir. 1983); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3d Cir. 1983); *Rogers* v. *Lockheed-Georgia Co*, 720 F.2d 1247 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); and *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983).

This overwhelming authority makes clear that the Sixth Circuit would have reached the same result had it utilized a *Chevron* approach in this case or in *Smith* v. *General Motors*, upon which the dismissal order was based. Indeed, both the concurrence and the dissent in *Smith* opined that *DelCostello* properly was accorded retrospective effect in Ohio under the *Chevron* standards. 747 F.2d at 376 (Merritt, J., concurring); 747 F.2d at 380 n.5 (Krupansky and Wellford, JJ., dissenting).

Recasting the lower court's analytical framework simply would lead again to the conclusion that *DelCostello* has retroactive force.[1] Petitioner therefore is not entitled to the Court's examination of this case.

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[1] Petitioner can find no solace in the *Chevron* factors in any event. He cites no Sixth Circuit case predating *Mitchell* or *DelCostello* establishing the statute of limitations for an Ohio plaintiff in a hybrid § 301/fair representation action. The petition wholly fails to demonstrate that retrosective application of *DelCostello* will retard the objectives — providing uniformity, assuring a satisfactory opportunity to vindicate employee rights, and promoting relatively rapid resolution of labor disputes — underlying *DelCostello*. Nor are the equities on Petitioner's side; his NLRB charge, which mirrored in all significant respects his allegations in the lawsuit, was resolved against him nearly eleven months after Kaiser terminated him, yet he waited over thirteen more months before suing Kaiser and over sixteen more months before suing the Union.

III. *DELCOSTELLO*'S RETROACTIVITY IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT CONSIDERATION BY THIS COURT.

The retroactivity of *DelCostello* does not deserve this Court's attention. Certiorari has been denied numerous times before, notwithstanding the apparent conflict among the circuits' approaches to the issue. *Scaglione* v. *Communications Workers*, 759 F.2d 201 (1st Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3271 (U.S. Oct. 22, 1985) (No. 85-416); *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985) (No. 85-264); *Saville* v. *Westinghouse Electric Corp.*, 760 F.2d 261 (3d Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3251 (U.S. Oct. 15, 1985) (No. 84-2034); *Greyhound Lines, Inc.* v. *Wilhite*, 760 F.2d 278 (9th Cir. 1985), *cert. denied*, __ U.S. __, 54 U.S.L.W. 3251 (U.S. Oct. 15, 1985) (No. 84-2016); *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 2357 (1985); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 594 (1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 512 (1984); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); and *McNaughton* v. *Dillingham Corp.*, 722 F.2d 1459 (9th Cir. 1984), *cert. denied*, __ U.S. __, 105 S. Ct. 291 (1984).

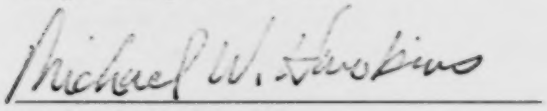
The Court's consistent declination to review is understandable. *DelCostello*'s retroactivity is at best an issue of academic interest, for no more hybrid § 301/duty of fair representation cases antedating *DelCostello* can be initiated. That species of case, moreover, soon will become extinct. Indeed, one court has recognized: "This problem will shortly go away, if it is not already gone . . ." *Zemonick* v. *Consolidated Coal Co.*, 762 F.2d 381, 389 (4th Cir. 1985). Because the retroactivity of *DelCostello* bears on a small, finite, and ever narrowing

group of litigants, this Court's discretionary review ought not to be devoted to this case.

CONCLUSION

For the reasons set forth above, Respondent Kaiser Engineers, Inc. requests that the writ be denied.

Respectfully submitted,



Michael W. Hawkins
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel of Record for Respondent
Kaiser Engineers, Inc.

Of Counsel:

Robert E. Kaplan
DINSMORE & SHOHL
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APPENDIX A

29 U.S.C. § 160. Prevention of unfair labor practices — Powers of Board generally

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

29 U.S.C § 185. Suits by and against labor organizations

* * *

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.